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Law & Legislation Committee
City Council Chambers
Sacramento, CA 95814

**Re: An Ordinance Prohibiting Discrimination
Against Individuals With Acquired Immune
Deficiency Syndrome (AIDS) In Employment,
Rental Housing, Business Establishments,
City-Owned or City-Supported Services and
Facilities, and Educational Institutions**

Honorable Members in Session:

SUMMARY

This report presents for Committee review an ordinance which would prohibit discrimination in the City of Sacramento against individuals with AIDS in the areas of employment, rental housing, business establishments, City-owned or City-supported services and facilities, and educational institutions.

BACKGROUND

On March 3, 1987, upon the request of the Mayor, the City Council referred to the City Attorney for review and drafting the City of Los Angeles ordinance prohibiting discrimination against individuals with AIDS and related conditions. The ordinance which the City Attorney's office presents is modeled on the Los Angeles ordinance. Differences will be highlighted in the Analysis Section of this report.

ANALYSIS

A. Provisions of the Ordinance.

Section 74.100 contains a short statement of findings. Omitted are many of the quasi-medical and other conclusions reached by the Los Angeles City Council in 1985. Medical knowledge expands and changes, and it is not desirable to include potentially inaccurate findings. A finding that discrimination exists and poses a threat to the City's health, safety, and welfare adequately supports the ordinance.

Section 74.105 sets forth the City's policy to eliminate discrimination against individuals with AIDS. This provision is not included in the Los Angeles ordinance, but is modeled on the City of Berkeley ordinance which itself was modeled on the City of Los Angeles ordinance and the City/County of San Francisco ordinance.

Section 74.110 contains the ordinance's definitions. Certain definitions have been modified for clarity or eliminated as unnecessary. Section 74.110(b), defining "an individual who has AIDS," describes the individuals to be protected against discrimination as anyone who has AIDS, anyone who is suspected of or perceived as having AIDS; anyone who is believed to be at risk of contracting AIDS; or anyone who is believed to associate with individuals who have AIDS. Definitions of business establishment, housing services, and rental unit are comparable to those in the Los Angeles ordinance.

Section 74.115 prohibits discrimination against individuals who have AIDS by employers, employment agencies and labor organizations. Prohibited acts include failing to hire, discharging, discriminating with respect to terms and conditions of employment or promotional and other opportunities, failing to refer for employment, failing to include in labor organization membership, and discriminating in admission to training and apprenticeship programs.

The ordinance permits discrimination based upon a bona fide occupational qualification. The employer has the burden to prove the existence of the bona fide occupational qualification and that there is no less discriminatory means of satisfying the qualification.

The ordinance also permits employers to comply with seniority and employee benefit systems.

The Berkeley ordinance contains an additional ground for permissible discrimination which is not found in the Los Angeles ordinance and which the Committee may wish to consider. It is:

Nothing in this Ordinance shall be deemed to prohibit selection or rejection where, because a person actually suffers from AIDS, he/she is unable to perform his or her duties, or cannot perform such duties in a manner which would not endanger his or her health or safety or the health and safety of others.

Section 74.120 prohibits discrimination against individuals who have AIDS in the rental of housing or transient accommodations. Prohibited are refusals to rent, evictions, imposition of less favorable terms and conditions, declaring unavailable a rental unit which is available, and advertising an unlawful preference or an intent to discriminate against individuals who have AIDS.

As in the Los Angeles ordinance, we have included an exemption for living units occupied by both the owner or lessor or any member of his or her family and the tenant. We have added an exemption where bathroom or kitchen facilities are shared.

Section 74.125 prohibits discrimination against individuals who have AIDS by business establishments. Exempted are blood banks and blood donation facilities, sperm banks and sperm donation facilities, organ donation facilities, surrogate mothers and surrogate mother facilities, and any other like service, facility or establishment engaged in the exchange of products containing elements of blood or semen.

Section 74.130 prohibits discrimination against individuals who have AIDS by any City facility or City service, or by any service, program, or facility which is wholly or partially funded or otherwise supported by the City.

Section 74.135 prohibits discrimination against persons with AIDS by private educational institutions in admissions or availability or facilities, services and programs. A statement is included that the ordinance does not bar religious and denominational educational institutions from limiting admissions to, or giving preference to, applicants of the same religion. The exemption for public educational facilities does not appear in the Los Angeles ordinance, but clarifies the fact that we may not legislate for public schools.

Section 74.140 provides that no advertising or publication is permitted which indicates an intent to engage in any unlawful practice described in the ordinance.

Section 74.145 prohibits subterfuge to avoid the application of the ordinance to prohibited discrimination.

Section 74.150 contains a health and safety exception which permits discrimination against an individual who has AIDS to protect the health or safety of the general public. The burden of proof is placed on the person who asserts that discrimination is necessary. The Los Angeles language has been modified somewhat.

Section 74.155. The Los Angeles ordinance contains a blanket exemption from all requirements for bona fide religious organizations. We have tightened the exemption so that it applies only in the conduct of religious activities. If the Committee desires a broader exemption, the Los Angeles language can be used.

Section 74.160 declares that one who discriminates is liable to the victim for actual damages, costs, and attorney's fee. It is further declared that violation of the Chapter shall not be deemed a crime. The Los Angeles ordinance authorizes punitive damages. In our opinion, this is a matter preempted by state law.

Section 74.165 concerns enforcement. Suit may be maintained by an aggrieved person for injunctive relief, damages, or both. Any person or entity which will fairly and adequately represent the interests of the protected class may also seek injunctive relief. The statute of limitations is set at one year.

The Los Angeles ordinance authorizes the City Attorney to bring an injunctive action. We do not recommend adding such litigation to the City Attorney's workload.

Section 74.170 adds a non-waiver provision not included in the Los Angeles ordinance.

Section 74.175 Severability clause.

B. Existing Laws Pertaining to Discrimination Against
Individuals Who Have AIDS.

Several existing California and federal laws pertain to discrimination against individuals who have AIDS. The purpose of this section is to describe these laws and discuss their interrelationship with the proposed ordinance.

1. The Unruh Act (California Civil Code Sections 51 et seq.)

The Unruh Act prohibits arbitrary discrimination against the patrons of business establishments, including rental housing. The protected classes enumerated in the Act have been held to be illustrative only, so that arbitrary discrimination against any individual or class of individuals violates the Act. We are aware of no case holding that discrimination against persons with AIDS violates the Unruh Act, but believe such a holding to be the likely result if the issue were presented. The Unruh Act allows for suits for actual and punitive damages, injunctions and attorney's fees. The prohibitions in the proposed ordinance which may already be covered by the Unruh Act concern rental housing, business establishments, educational institutions, and privately-run facilities which are partially or wholly supported by City funds. We do not believe the Unruh Act applies to the City directly. Nor does it cover the employment relationship.

It has been held that the Unruh Act does not preempt local ordinances concerning discrimination.

2. The California Fair Employment and Housing Act
(California Government Code Section 12900 et seq.)

The California Fair Employment and Housing Act (FEHA) prohibits discrimination in employment because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex or age. Government Code Section 12920.

On February 5, 1987, the Fair Employment and Housing Commission ruled that AIDS is a physical handicap and that employment discrimination on the basis of AIDS is unlawful. Department of Fair Employment and Housing v. Raytheon Company, Case No. FEP83-84. According to the Commission, unlawful discrimination may have occurred if an employer takes any of the following actions because a person has AIDS, or because the employer thinks the person has AIDS or might contract AIDS

in the future: refusal to hire, discharge, refusal to reinstate after medical leave, termination or reduction of benefits, alteration of working conditions or duties against the wishes of an employee, or any other adverse change in job terms or conditions.

Unless the Commission's decision is overturned by judicial decision, it appears that those provisions of the proposed ordinance which deal with unlawful employment practices are covered by the FEHA.

The Act's provisions concerning housing discrimination do not prohibit discrimination on the basis of physical handicap. Government Code Section 12920. In contrast to rulings on the Unruh Act, the FEHA's listing of protected classes has been held not to be merely illustrative, but to specify all classes who are protected. Therefore, it does not appear that the FEHA protects persons with AIDS from discrimination in housing accommodations.

As with the Unruh Act, the FEHA does not preempt local ordinances concerning discrimination.

3. Section 504 of the Rehabilitation Act of 1973
(29 United States Code Section 794)

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap in programs receiving federal financial assistance. On March 3, 1987, the United States Supreme Court held that a contagious disease is a handicap within the meaning of Section 504. Nassau County v. Arline (1987) 87 Daily Journal D.A.R. 793. It is anticipated that the AIDS disease would be similarly categorized. To the extent that any of the acts prohibited by the proposed ordinance are committed within programs receiving federal financial assistance, Section 504 would already prohibit that discriminatory act.

Section 504 does not preempt local ordinances concerning discrimination.

4. Conclusion re Existing Laws.

It appears that most practices prohibited by the proposed ordinance are already prohibited by either the Unruh Act or the Fair Employment and Housing Act. However, until the Unruh Act is interpreted by court decision to protect individuals with AIDS, the question is not free from doubt. A local ordinance would ensure that individuals with AIDS

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are protected from discrimination in all public accommodations and business establishments. In any event, there is nothing which precludes a local jurisdiction from enacting a comprehensive ordinance pertaining solely to discrimination against persons who have AIDS, so long as it does not conflict with existing state or federal law.

RECOMMENDATION

This ordinance is presented for review and action by the Committee.

Respectfully submitted,

JAMES P. JACKSON
City Attorney

By



DIANE B. BALTER
Deputy City Attorney

ORDINANCE NO.

ADOPTED BY THE SACRAMENTO CITY COUNCIL ON DATE OF

AN ORDINANCE ADDING CHAPTER 74 TO THE
SACRAMENTO CITY CODE PROHIBITING
DISCRIMINATION IN EMPLOYMENT, RENTAL
HOUSING, BUSINESS ESTABLISHMENTS, CITY
FACILITIES AND SERVICES, AND EDUCATIONAL
INSTITUTIONS ON THE BASIS OF ACQUIRED
IMMUNE DEFICIENCY SYNDROME (AIDS) AND
RELATED CONDITIONS

BE IT ENACTED BY THE CITY COUNCIL OF THE CITY OF SACRAMENTO:

SECTION 1.

Chapter 74 is hereby added to the Sacramento City Code to read as follows:

Chapter 74

DISCRIMINATION - ACQUIRED IMMUNE DEFICIENCY SYNDROME

Sec. 74.100 Findings.

The City Council finds and declares:

Discrimination against victims of AIDS and AIDS-related conditions exists in the City of Sacramento. Individuals with AIDS or AIDS-related conditions are faced with discrimination in employment, housing, business establishments, and other public accommodations. This discrimination cuts across all racial, ethnic, and economic lines. Such discrimination poses a substantial threat to the health, safety, and welfare of the community. Existing state and federal restraints on such arbitrary discrimination are inadequate to meet the particular problems of this City.

Sec. 74.105 Policy.

It is the policy of the City to eliminate discrimination within the City of Sacramento against individuals who have Acquired Immune Deficiency Syndrome (AIDS) or any related condition or who are suspected of or perceived as having AIDS or who are believed to be at risk of having AIDS or who associate with individuals who have AIDS.

Sec. 74.110 Definitions.

(a) AIDS. In this Ordinance, "AIDS" means Acquired Immune Deficiency Syndrome (AIDS), AIDS related conditions (ARC), or any other medical condition which an individual contracts as a result of having AIDS or ARC.

(b) An individual who has AIDS. In this Ordinance, the term "an individual who has AIDS" or "an individual has AIDS" means anyone who has AIDS, as defined in subsection (a) of this section; anyone who is suspected of, or perceived as having such a condition; anyone who is believed to be at risk of contracting such a condition; or anyone who is believed to associate with individuals who have AIDS.

(c) Business establishments. Any entity, however, organized, which furnishes goods, services or accommodations to the general public. An entity which has membership requirements is considered to furnish goods, services or accommodations to the general public if its membership requirements: (1) consist only of payment of fees; or (2) consist of requirements under which a substantial portion of the residents of the City could qualify.

(d) Housing services. Services connected with the use or occupancy of a rental unit including but not limited to utilities (including light, heat, water and telephone), ordinary repairs or replacement, and maintenance, including painting. This term shall also include the provision of elevator service, laundry facilities and privileges, common recreational facilities, janitor service, resident manager, refuse removal, furnishings, food service, garage or parking facilities, and any other benefits, privileges or facilities.

(e) Individual. A natural person.

(f) Person. Any natural person, firm, corporation, partnership, or other organization, association or group of persons however organized.

(g) Rental unit. Any dwelling unit, housing accommodation, or guest room rented, offered for rent or let for living or dwelling purposes or transient occupancy, the land and buildings appurtenant thereto, and all housing services supplied in connection with the use or occupancy thereof. "Rental unit" shall not include housing accommodations which a governmental unit, agency or authority owns, operates, or manages, and which are specifically exempted from municipal

regulation by state or federal law or administrative regulation.

Sec. 74.115 Unlawful employment practices.

(a) It shall be an unlawful employment practice for any person, or any agent or employee of such person, to do or attempt to do any of the following on the basis (in whole or in part) that an individual has AIDS:

(1) By an employer: fail or refuse to hire, discharge, or discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, including promotion; or limit, segregate or classify employees in any manner which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect an individual's employment status.

(2) By an employment agency: fail or refuse to refer for employment any individual, or otherwise discriminate against any individual.

(3) By a labor organization: fail or refuse to include in its membership, expel from its membership, or otherwise discriminate against any individual; or limit, segregate or classify its membership; or classify or fail or refuse to refer for employment and individual in any way which would deprive or tend to deprive such individual of employment opportunities, or would limit such employment opportunities, or otherwise adversely affect an individual's status as an employee or as an applicant for employment;

(4) By an employer, employment agency or labor organization: discriminate against any individual in admission to or employment in, any program established to provide apprenticeship or other training or retraining, including any on-the-job training program;

(b) Nothing in this Chapter shall be deemed to prohibit selection, rejection, dismissal or any other employment practice based upon a bona fide occupational qualification. Any person who asserts that an otherwise unlawful discriminatory practice is justified based upon a bona fide occupational qualification shall have the burden of proving that (1) the discrimination is in fact a necessary result of a bona fide occupational qualification; and (2) there exists no less discriminatory means of satisfying the occupational qualification.

(c) It shall not be unlawful employment practice for an employer to observe the conditions of a bona fide seniority system or a bona fide employee benefit system, provided such systems or plans are not a subterfuge to evade the provisions of this Chapter.

Sec. 74.120 Unlawful housing practices.

(a) It shall be an unlawful housing practice for any person, or any agent or employee of such person, to do or attempt to do any of the following on the basis (in whole or in part) that an individual has AIDS:

(1) Refuse to rent, lease or let any rental unit, refuse to negotiate for the rental or lease of any rental unit, evict an individual from any rental unit, or otherwise deny or withhold a rental unit.

(2) Rent, lease or let any rental unit on less favorable terms, conditions or privileges, or discriminate in the provision of housing services.

(3) Represent to any individual that a rental unit is not available for inspection, rental, lease, or letting when such rental unit is, in fact, available.

(4) Make, print, publish, advertise, or disseminate or cause to be made, printed, published, advertised, or disseminated any notice, statement, sign, advertisement, application, or contract with regard to a rental unit that indicates any preference, limitation, or discrimination with respect to the fact that an individual has AIDS.

(b) Nothing in this Chapter shall be construed to apply to the rental, leasing or letting of any rental unit in which the owner or lessor or any member of his or her family occupies the same living unit in common with the prospective tenant, or in which it is necessary for the owner or lessor or any member of his or her family to use either a bathroom or kitchen facility in common with the prospective tenant.

Sec. 74.125 Unlawful business practices.

(a) It shall be an unlawful business practice for any person to deny any individual the full and equal enjoyment of goods, services, facilities, privileges, advantages and accommodations of any business establishment including, but not limited to, medical, dental, health care and convalescent services of any kind whatsoever, on the basis (in whole or in part) that such individual has AIDS.

(b) Nothing in this Chapter shall apply to any blood bank, blood donation facility, sperm bank, sperm donation facility, organ donation facility, surrogate mother or surrogate mother facility, or to any like service, facility or establishment engaged in the exchange of products containing elements of blood or semen.

Sec. 74.130 City services, programs and facilities.

It shall be an unlawful practice for any person, or any agent or employee of such person, to deny or attempt to deny any individual the full and equal enjoyment of, or to impose different terms and conditions upon the availability of, on the basis (in whole or in part) that an individual has AIDS:

- (1) Any City service, City program, or City facility.
- (2) Any service, program or facility wholly or partially funded or otherwise supported by the City. This subsection shall not apply to any service, program or facility which does not receive any financial assistance from the City which is not provided to the public generally.

Sec. 74.135 Unlawful educational practices.

(a) It shall be an unlawful educational practice for any person, or any agent or employee of such person, to do or attempt to do any of the following on the basis (in whole or in part) that an individual has AIDS:

- (1) Deny admission, or impose different terms or conditions on admission to any educational institution.
- (2) Deny any individual the full and equal enjoyment of, or impose different terms and conditions upon the availability of, any facility owned or operated, or any service or program offered, by an educational institution.

(b) Nothing in this Chapter shall be construed to prohibit a religious or denominational educational institution from limiting admission to, or giving preference to, applicants of the same religion.

(c) Nothing in this Chapter shall be construed to apply to any educational institution owned or operated by any federal, state, or local government agency.

Sec. 74.140 Advertising.

It shall be unlawful for any person to make, print, publish, advertise or disseminate or cause to be made, printed, published, advertised or disseminated in any way any notice, statement, sign or advertisement which indicates an intent to engage in any unlawful practice set forth in this Chapter.

Sec. 74.145 Subterfuge.

It shall be an unlawful discriminatory practice to do any of the acts mentioned in this Chapter for any reason which would not have been

asserted, wholly or partially, but for the fact that the individual against whom such assertions are made has AIDS.

Sec. 74.150 Health and Safety Exception.

Nothing in this Chapter shall be construed to prohibit any otherwise unlawful practice which is necessary to protect the health or safety of the general public. Any person who asserts that an otherwise unlawful practice is necessary shall have the burden to establish that (1) the practice is necessary to protect the health or safety of the general public; and (2) there exists no less discriminatory means of protecting the health or safety of the general public.

Sec. 74.155 Exemption for religious organizations.

No part of this Chapter shall apply to any bona fide religious organization in the conduct of its religious activities.

Sec. 74.160 Liability.

(a) Any person who violates any provision of this Chapter or who aids in the violation of any provision of this Chapter shall be liable to the individual whose rights are violated for actual damages, costs and attorney's fees.

(b) Notwithstanding any other provision of this Code to the contrary, violation of any provision of this Chapter shall not be deemed a crime.

Sec. 74.165 Enforcement; limitation of action.

(a) Any aggrieved person may enforce the provisions of this Chapter by means of a civil action.

(b) Any person who commits, or proposes to commit, an action in violation of any provision of this Chapter may be enjoined therefrom by any court of competent jurisdiction upon application by any aggrieved person or by any person or entity which will fairly and adequately represent the interests of the protected class.

(c) Any action under this Chapter must be filed within one year of the alleged unlawful practice.

(d) Nothing in this Chapter shall preclude any aggrieved person from seeking any other remedy provided by law.

Sec. 74.170 No waiver.

Any written or oral agreement whereby any provision of this Chapter is waived or modified is against public policy and void.

Sec. 74.175 Severability.

If any part or provision of this Ordinance, or the application thereof to any person or circumstance, is held invalid, the remainder of the Ordinance, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this Ordinance are severable and are intended to have independent validity.

DATE PASSED FOR PUBLICATION:

DATE ENACTED:

DATE EFFECTIVE:

MAYOR

ATTEST:

CITY CLERK